BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

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| IN THE MATTER OF M & M CRUSHING COMPANY, INC., Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY Respondent. | PCHB No. 78-88<br><br>FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER |

This matter, the appeal of two $250 civil penalties for emissions allegedly in violation of respondent's Sections 9.03(b) (opacity) and 9.15(a) (airborne dust) of Regulation I, came on for hearing before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, and Chris Smith, Member, convened at Tacoma, Washington on July 6, 1978. Hearing examiner William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant, M & M Crushing Company, Inc., appeared by its President, Wayne G. Mosby. Respondent appeared by its attorney, Keith D. McGoffin.

WAH/DO

Court reporter Christy Check recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. Briefs were submitted by the respondent and by the Muckleshoot Indian Tribe, and the State of Washington, Department of Ecology, as amicus curiae. Having heard the testimony, having examined the exhibits, having considered the briefs submitted and being fully advised, the Pollution Control Hearings Board makes these

## FINDINGS OF FACT

### I

Respondent, pursuant to RCW 43.21B.260, has filed with this Board a certified copy of its Regulation I containing respondent's regulations and amendments thereto of which official notice is taken.

### II

In January, 1978, M & M Crushing Company, Inc. (hereafter M & M), appellant, through Wayne G. Mosby, its President, became interested in reroving gravel from a site near Howard Road and Auburn Way in Auburn, Washington. The site is owned by "The United States of America in Trust for the Muckleshoot Indian Tribe".[1] Neither Mr. Mosby nor the other employees of M & M involved here are Indians.

In February, 1978, M & M entered into a contract with the Muckleshoot Indian Tribe for the removal of the gravel which would facilitate the construction of a shopping center which the Tribe plans to construct at that location. Before beginning work, the

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1. See Statutory Warranty Deed from Armstrong to the United States of America.

General Manager of M & M inquired whether the respondent air pollution control agency had jurisdiction on tribal land. A non-Indian consultant and business representative for the Tribe replied that respondent had no jurisdiction.

III

In reliance on this advice, M & M began crushing operations at the site without using the water sprinkling system normally employed to suppress dust. On March 6, 1978, in response to complaints received by the City of Auburn and at the City's request, respondent sent an inspector to M & M's work site on Tribal land. The inspector observed airborne dust arising from the jaws of M & M's crusher and we find that appellant caused this emission of airborne white dust. We further find that this emission was of an opacity of 60 percent for eight consecutive minutes. Rain had dampened the material being crushed on that day, however, and the emission was not great in total volume.

IV

Respondent issued two Notices of Violation to appellant's employees at the site. These, like the Notices of Civil Penalty (Nos. 3737 and 3738) which appellant received later, cite Sections 9.03(b) and 9.15(a) of respondent's Regulation I. A civil penalty of $250 was assessed for the violation of each section for a total fine of $500 from which appellant now appeals. Appellant now uses its water sprinkling systems to suppress dust emissions regardless of where gravel is being crushed.

V

The appellant was not shown to have previously violated respondent's Regulation I.

VI

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I

After the hearing on the merits in this matter and after receipt of briefs from the respondent and amicus curiae, appellant filed a letter stating that it withdrew its appeal. Under these circumstances, we conclude that such withdrawal must be treated as a request addressed to the sound discretion of this Board. See Civil Rules for Superior Court, CR 41, relating to voluntary dismissal which we follow by analogy. Appellant's request to withdraw is denied.

II

In failing to use the water sprinkling system which is normally used to suppress dust emissions from the jaws of the crusher, appellant violated Section 9.15(a) of respondent's Regulation I which requires reasonable precautions to prevent particulate matter from becoming airborne. ("Particulate matter" includes dust emissions. Section 1.07(w) of Regulation I.)

In emitting an air contaminant, dust, for more than three minutes in any one hour, which contaminant is of an opacity obscuring an

observer's view to a degree equal to or greater than does smoke designated as No. 1 on the Ringelmann Chart (20 percent density), appellant violated Section 9.03(b) of respondent's Regulation I.

Section 3.29 of respondent's Regulation I authorizes a civil penalty not to exceed $250 for each violation of a provision of Regulation I.

III

Appellant contends that it was not subject to respondent's Regulation I while operating under Indian contract on Indian land.

The Federal Clean Air Act, 42 U.S.C.A. § 7401, et seq., establishes a national program of air pollution control. See 42 U.S.C.A. § 7401. There is no express exemption for sources on Indian lands. To the contrary, the Federal Clean Air Act states:

> Each state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such state by submitting an implementation plan for such state which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such state." 42 U.S.C.A. § 7407(a). (Emphasis added.)

Regulation I of respondent is part of this state's implementation plan for achieving national ambient air quality standards. Regulation I was approved and adopted for this purpose by the federal government. 42 CFR 52, Subpart WW.

We therefore conclude that appellant, although operating under Indian contract on Indian land, was subject to the requirements of respondent's Regulation I and to respondent's enforcement thereof.

IV

Because appellant was not shown to have previously violated respondent's Regulation I, and because it received well intended but misleading advice concerning the applicability of respondent's Regulation I, and, further, because the emissions which appellant caused were not great in total volume and because appellant now uses its water sprinkling dust suppression system in all instances, the penalties imposed upon appellant should be substantially mitigated.

V

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Board enters this

ORDER

The two violations and civil penalties (Notices Nos. 3737 and 3738) are each affirmed; provided, however, that $200 of each penalty is suspended on condition that appellant not violate respondent's regulations for a period of one year from the date of appellant's receipt of this Order. Total penalties in the amount of $100 are therefore affirmed absolutely.

DONE this 16th day of October, 1978.

POLLUTION CONTROL HEARINGS BOARD

DAVE J. MOONEY, Chairman

CHRIS SMITH, Member